SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

TRIAL PART 14
NASSAU COUNTY

PATRICK HIRSCH,

Plaintiff,

-against-

MOTION # 02
INDEX # 606455/2018
MOTION SUBMITTED:
AUGUST 18, 2020

CITY OF LONG BEACH, CHARLES A. MACAVOY, INC., GP PILES, INC. and JANE ABITABILO as Executor of the Estate of JANE M. DUNNIGAN,

Defendants.

CHARLES A. MACAVOY, INC.,

Third-Party Plaintiff,

-against-

DOODYMAN TO THE RESCUE, INC.,

Third-Party Defendant.

JANE ABITABILO, as Executor of the Estate of JANE M. DUNNIGAN,

Second Third-Party Plaintiff,

-against-

PERFORMANCE CONTRACTING OF LONG ISLAND, INC.,

Second Third-Party Defendant.

The following papers having been read on this motion:

Notice of Motion/Order to Show Cause.....1
Cross Motion/Answering Affidavits.....2, 3, 4, 5, 6, 7
Reply Affidavits.....8, 9

Defendant City moves for summary judgment dismissing the complaint as to it pursuant to CPLR §3212.

Plaintiff seeks damages for personal injuries allegedly sustained on July 2, 2017 on Alabama Street (a city street) as a result of a depressed asphalt patch that caused him to be dislodged from his motorized scooter. According to plaintiff's deposition testimony, prior to the occurrence he was riding on the sidewalk, but he entered the roadway because he saw construction activities disrupting passage on the sidewalk.

The following facts are undisputed: 1) there was no construction being performed by the City at the site prior to the occurrence; 2) on October 11, 2016 the City issued a road opening permit to defendant Macavoy in connection with a tie in to the main sewer line from an adjacent home; 3) Macavoy was legally required to install a temporary patch and did so; 4) the City was required to install a permanent patch but had not done so prior to the time of the occurrence; 5) other than the documents related to the road opening permit the City had no written notice of the alleged road defect.

Summary judgment is a drastic remedy and should only be granted when there are no triable issues of fact (*Andre v. Pomeroy*, 35 N.Y.2d 361 [1974]). The goal of summary judgment is to issue find, rather than issue determine (*Hantz v. Fleischman*, 155 A.D.2d 415 [2nd Dept. 1989]). The proponent of a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]).

Section 256A (1) of the Long Beach City Charter provides that no civil action based on a defective condition may be maintained unless the City had written notice of the defect. "The failure to demonstrate prior written notice leaves plaintiff without legal recourse against the City for its purported nonfeasance or malfeasance in remedying a defective sidewalk. Because this prior written notice provision is a limited

waiver of sovereign immunity, in derogation of common law, it is strictly construed" (*Katz v City of New York*, 87 N.Y.2d 241, 638 N.Y.S.2d 593 [1995, internal citations omitted]). Defendant City has set forth a *prima facie* showing of entitlement to summary judgment.

Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

Plaintiff and co-defendants assert that there are such issues of fact. First whether the City's delay in installing the permanent patch was be an act of affirmative negligence, which is an exception to the immunity granted by notice statutes (*see, Amabile v City of Buffalo*, 93 NY2d 471, 603 NYS2d 77 [1999]). Second, whether the road opening permit or inspection of the sewer connection constituted constructive notice of the defect. Both of these issues are grounded in legal arguments which are insufficient.

The "active negligence" exception to the notice statute is inapplicable in the case at bar. In *Rodriguez v County of Westchester*, 138 AD3d 713, 29 NYS 3d 418, (2016) the Second Department held:

> The City established its *prima facie* entitlement to judgment as a matter of law by demonstrating that it did not receive prior written notice of the snow and ice condition which caused the plaintiff's accident, as required by section 24-11 of the Charter of the City of Yonkers (see *Maya v Town of Hempstead*, 127 AD3d 1146 [2015]; *Lopez-Calderone v Lang-Viscogliosi*, 127 AD3d 1143 [2015]; *Johnson v Braun*, 120 AD3d 765, 765-766 [2014])...The City's alleged failure to remove the snow and ice from the sidewalk, or to warn of a dangerous condition, **were acts of omission, and not affirmative acts of negligence** (see *Alfano v City of New Rochelle*, 259 AD2d 645 [1999]; *Grant v Incorporated Vil. of Lloyd Harbor*, 180 AD2d 716 [1992]; *Buccellato v County of Nassau*, 158 AD2d 440, 442 [1990]).
>
> [emphasis supplied]

Similarly, there is no constructive notice exception to the notice provision in the City Charter. The parties opposing this motion cite *Ciccarella v Graf*, 116 AD2d 615, 497 NYS2d 704 (2nd Dept. 1986) for

the proposition that constructive notice of a defect by a municipality may confer liability. That case is inapplicable. In *Ciccarella* no written notice statute was asserted or considered by the court. In addition, *Ciccarella* was decided more than ten years before the decision in *Amabile v City of Buffalo*, 93 NY2d 471, 603 NYS2d 77 [1999], which held:

> We conclude that constructive notice of a defect may not override the statutory requirement of prior written notice of a sidewalk defect. The Legislature has made plain its judgment that the municipality should be protected from liability in these circumstances until it has received written notice of the defect or obstruction. As we have previously stated,
>
> > "The state created the defendant as a political agency of government and the adjustment of its powers and duties, and of the relative rights of citizens and municipality, was the province of the legislature. * * * [Although the city charter's] requirement that a written notice shall have been given to the common council, as a condition precedent to the maintenance of an action, [may] be regarded as harsh, correction is not to be sought from the courts. The requirement is the expression of the legislative will" (*MacMullen v. City of Middletown*, 187 N.Y. 37, 47, 79 N.E. 863).

Judicial recognition of a constructive notice exception would contravene the plain language of the statute and serve only to undermine the rule.

The City's motion for summary judgment in its favor is granted.

This constitutes the decision and order of the court.

DATED: January 12, 2021

ENTER

Jack L. Libert

HON. JACK L. LIBERT
J. S. C.

ENTERED
Jan 19 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE